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IN THE

Supreme Court of the United States

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL,
Petitioners,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a[1]) has

[1] The appendix to this petition is cited herein as "App". The printed record in the court of appeals is cited as "R". References to appellees' supplemental printed record in the court of appeals will be cited as "Supp. R." Pursuant to Rule 21(3), nine copies of the portions of the record printed for use of the court below are being filed with this petition. In the event of a grant of the petition for certiorari, petitioners may file with this Court additional portions of the original record in the district court, which were also part of the record before the court below.

not yet been reported. The Memorandum of Decision and Order for Judgment of the district court appears at R. 139-154.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1957 (App. 32a). On August 15, 1957 an order extending to and including September 12, 1957 the time within which to file a petition for writ of certiorari was signed by Mr. Justice Whittaker. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In an action for damages and injunctive relief under the antitrust laws, the district court referred the "entire cause" to a special master "to hear the evidence" and to make "where necessary special findings of fact and conclusions of law", such powers to be exercised until otherwise limited by order of the court. In proceedings before the special master on a motion by petitioners for leave to remove attorneys who had publicly manifested hostility to petitioners and had made statements in the proceedings materially adverse to petitioners, the special master refused leave to replace the attorneys unless petitioners first paid substantial fees to them, and refused to permit petitioners to file pleadings before the master or the court other than through their attorneys. Petitioners, effectively without counsel, failed to comply with orders of the court requiring deposit of funds to defray fees and expenses of the master and with respect to continuing to submit themselves as witnesses in pretrial deposition proceedings. The district court dismissed the action with prejudice and the court below affirmed.

The questions presented are:

1. Whether the reference to the master constituted an unlawful abdication of the responsibilities of the district court in violation of the rule of *LaBuy* v. *Howes Leather Company*, 353 U.S. 249.

2. Whether petitioners were deprived of their constitutional right to be represented by counsel of their choice.

3. Whether it was reversible error to dismiss the antitrust suit with prejudice on the basis of conduct of petitioners directly flowing from orders of the master in effect compelling them to be represented by counsel not devoted to their interests.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth in the Appendix, *infra* p. 33a.

STATEMENT

Introduction

Petitioners seek review of a judgment of the court of appeals (App. 32a) affirming a dismissal, with prejudice, of an antitrust suit by petitioners against respondents (App. 2a).

The case was never tried on the merits. Dismissal was ordered as a penalty for certain alleged misconduct of petitioners occurring during the course of pretrial discovery proceedings (R. 152-153). Petitioner had failed to make a deposit ordered by the court to defray expenses and fees of a special master, and

certain individual petitioners had refused to continue to submit themselves as witnesses in deposition proceedings (App. 2a-3a). The allegedly contumacious conduct occurred under circumstances in which a series of orders of the special master had effectively deprived petitioners of the opportunity to select their own attorneys, except upon oppressive conditions, and of the opportunity to obtain review by the district court of the special master's orders (R. 70-76, 103-107).

The Parties and the Complaint

Petitioner First Iowa Hydro Electric Cooperative (hereinafter sometimes called "First Iowa" or "the Cooperative") is a non-profit Iowa association licensed by the Federal Power Commission to construct and operate a hydro-electric project to generate, sell and distribute electric power within a multi-state area including Iowa and neighboring states.[2] The individual petitioners are members of the Cooperative who were also plaintiffs below (App. 3a).

Respondents are power companies which operate in the area proposed to be served by the Cooperative, and an unincorporated association of which the corporate respondents are members (R. 16-17). The complaint alleges that the corporate defendants have controlled 90% of the business in the sale and distribution of electric light and power in Iowa, Southwestern Wisconsin, Western Illinois and Northeastern Missouri (R. 17).

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[2] For earlier litigation involving issuance of this license see *First Iowa Hydro Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 and *State of Iowa* v. *Federal Power Commission*, 178 F. 2d 421 (C.A. 8), cert. den. 339 U.S. 979.

The complaint charges a conspiracy among respondents to monopolize the generation, transmission, distribution and sale of electric light and power in the area served by them (R. 18-20) in violation of the Sherman and Clayton Acts (R. 15).[3] It is charged that respondents engaged in deliberate and continued activities designed to prevent and having the effect of preventing the Cooperative from obtaining financing for its proposed project and charged agreement among them to join together to oppose the proposed project and to refuse to use any power produced by the project if it should be built (*ibid*). As has been noted, the merits of the complaint were not heard by either of the courts below.

The Appointment of the Special Master and the Deposit Order

The special master whose orders led to the dismissal of this action (Mr. Doerr) was the second special master appointed in the proceedings, a former special master with carefully limited powers (R. 23) having resigned after his impartiality was challenged (App. 12a). The order appointing Master Doerr was phrased in sweeping terms, providing (App. 14a):

> *that this entire cause be referred to him for such proceedings as may be necessary,* to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court. [Emphasis supplied.]

[3] Act of July 2, 1890, Sections 1, 2, 7, 26 Stat. 209 as amended, 15 U.S.C. 1, 2, 7; Act of October 15, 1914, Sections 1, 4, 5, 7, 38 Stat. 730 as amended, 15 U.S.C. 12, 15, 16, 18.

The order of reference recited as justifications mainly that the issues were abnormally complicated, that extended discovery proceedings were in progress, that there was a controversy between petitioners and their counsel, and that the court's docket was crowded (App. 13a). The order also required petitioners and respondents each to pay $2500 into the registry of the court to provide for payment of fees and disbursements of the master (R. 50).

A motion by an individual petitioner, *pro se*, requested deferment of this deposit until petitioners could be advised by new counsel in the matter (the motion to dismiss the attorneys of record being then pending) (R. 41, 50). The court summarily denied the deferment request (R. 52), noting in its order of denial that "The powers of the master appointed Sept-21, 1955, are deliberately and intentionally broad and the matter of depositions is but an incident of his power and duties" (R. 53).

After the master had proceeded under this broad delegation of authority for several months, and had gone so far as to enter an unqualified order of dismissal against two of the petitioners (R. 115), the district court issued an order construing the original order of reference to the effect that the order "does not and cannot deprive plaintiffs of their right of trial by jury * * *, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause" (Supp. R. 125). This interpretation was rendered in January 1956, shortly prior to the entry of the court's final judgment of dismissal.

The validity of the order appointing the master was challenged repeatedly by petitioners' counsel of record

(R. 1, 5, 7, 12, 117-118, 134-136, 137-138, 138-139). The early objections were filed before the master, who, on one occasion, ruled them premature (R. 1) and on later occasions overruled them on the merits (*e.g.* R. 5, 7), but who never ruled that he lacked power to pass upon them. He repeatedly ruled that participation in the proceedings would not be construed as a waiver of objections to his appointment (*e.g.* R. 5, 7, 12, 114). In addition to the objections filed by the attorneys, petitioners, acting *pro se,* petitioned the court to vacate the order of reference (R. 89, 93), but this request was stricken by order of the master (R. 103, 106).[4]

The Proceedings for Removal of Petitioners' Attorneys

At one stage in the proceedings in the district court, petitioners sought to associate additional counsel in the case after notifying their attorneys of record (R. 31). Without notice to petitioners the attorneys of record filed a motion to quash the appearance of the new counsel (R. 28). Thereafter, petitioners moved for leave to dismiss their attorneys of record in a sworn pleading alleging specified misconduct and asserting a complete loss of faith in these attorneys (R. 41-47).

The resistance filed by the attorneys (R. 54) is the first of a series of unrestrained attacks upon their clients by attorneys *who nevertheless insisted upon the right to continue to represent them.* Thus, *inter alia,*

[4] In the opinion of the court of appeals it is inaccurately stated that no objections to the master's appointment were made to the district judge by petitioners until January 19, 1956 (App. 27a) which was some four months after the order appointing the master. The above-mentioned *pro se* pleading was filed on October 17, 1955 (R. 86).

petitioners were accused by their attorneys of "a fraudulent conversion of trust funds" (R. 57), "fraud and perjury" (R. 59) and "seeking to perpetrate a fraud upon this court and to use this court and this lawsuit as an instrument for the commission of a fraud" (R. 62).

The special master scheduled a hearing on petitioners' removal motion (R. 160). On the day of the hearing certain of petitioners appeared personally before the court of appeals to prosecute a petition for leave to file a petition for a writ of mandamus and injunction and seeking a stay of all proceedings in the district court.[5] Although the special master was advised that petitioners were then seeking extraordinary relief from the court of appeals and a continuance was requested, he nevertheless proceeded with the hearing on the removal motion in the absence of petitioners (R. 1-2).

Although the attorneys of record testified at the hearing, they failed to deny under oath various sworn charges of petitioners (such as the charge that one of them had physically assaulted one of the individual petitioners (R. 44)). And they failed to explain the extraordinary denunciation of their clients contained in the resistance filed by the attorneys. Indeed, the attorneys called as their witness one who had moved for intervention in the main lawsuit and who had taken a position adverse to petitioners in the proposed complaint in intervention (R. 65-69). Testimony adverse to petitioners was elicited from this witness under leading questioning by the attorneys (R. 2).

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[5] The court of appeals denied the motion for want of jurisdiction (R. 77).

In the face of the overt demonstration by the attorneys of hostility to their clients, and the public accusations by the attorneys against petitioners of crimes involving moral turpitude (*e.g.*, fraud and perjury (R. 59)), the special master found that the attorneys had served petitioners "loyally, zealously and effectively" and "No cause exists for their discharge" (R. 72). While he granted leave to discharge the attorneys, he conditioned such permission upon payment to them of $200,000 in fees (R. 71), subject to reduction only in the event petitioners lacked means to pay the fees (*ibid*).

Petitioners had been accorded the privilege of being represented by counsel of their choice in connection with the removal proceedings (R. 54), which presumably included the right (at least as to the individual petitioners) to be represented *pro se*.[6] Nevertheless petitioners' subsequent pleadings seeking to secure review of the master's order (R. 86, 89) were ordered stricken on the ground that they were not signed by attorneys of record (R. 103, 106).

Throughout the remaining proceedings before the master and in the court below, the attorneys of record for petitioners continued to make statements adverse

[6] In a subsequent order (R. 108, 110) the master found that, apart from their local attorneys of record, petitioners also had available the services of "counsel of record who reside outside of the district." The Washington, D. C. firm of Haley, Doty & Schellenberg (later Haley, Doty & Wollenberg) had appeared as "of counsel" in the proceeding (R. 22), but no member of the firm entered an individual appearance, appeared before the district court or master, or on a pleading in the case, prior to the filing of the notice of appeal from the decision of the district court (R. 155). Rule 5 of the Rules of the District Court for the Southern District of Iowa requires that the individual names of all attorneys "in a cause" shall appear on the first pleading filed by them. Only the local attorneys involved in the removal proceedings were attorneys of record under the terms of this Rule.

to petitioners and failed to take actions essential to effective representation of petitioners.[7]

The Conduct of Petitioners Upon Which the Dismissals Were Predicated

1. The Refusals to Testify

At deposition proceedings subsequent to the order with respect to removal of attorneys, one individual petitioner (Strong) declined to testify further, and another individual petitioner (Gillmor) declined to testify, on the ground that they were unrepresented by counsel as a result of the orders precluding discharge of the attorneys of record except upon onerous conditions.[8]

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[7] *E. g.*, the attorneys of record failed to file any response to the initial motion of respondents to dismiss the complaint (R. 82-84). One of the attorneys threatened one of the petitioners on the record that he would soon be brought before a grand jury (R. 12). In exceptions to the master's report, the attorneys of record accused their clients of engaging in a "subterfuge" by which the court was to be "hood-winked" into dismissing the case (R. 136).

After the final decision of the district court dismissing the action, the attorneys of record filed an appeal purportedly "as attorneys of record for petitioners and in their own behalf as such attorneys of record" *First Iowa Hydro Electric Cooperative et al.* v. *Iowa-Illinois Gas & Electric Co. et al.* (C.A. 8, Case No. 15,549, decided May 24, 1957). In this appeal the attorneys purported to represent clients none of whom authorized the appeal (Slip Op. pp. 5-6, Case No. 15,549, *supra*), and continued to make statements adverse to some of the petitioners, such as: "Their conduct cannot be explained upon any reasonable or rational basis and we do not propose to try to excuse or defend their actions. As officers of this court, we feel that we would be less than fair with the court if we did not take this position." (Appellants' Br. in Case No. 15,549, p. 42).

[8] Thus Strong stated (R. 3-4):

> Mr. Master, I am Harry J. Strong, Plaintiff, the witness called in this deposition.
>
> I am here unrepresented by counsel.
>
> The Court has been on notice since September 2nd, that we have discharged our counsel.
>
> The Court has seen fit to freeze us in that position, and un-

2. The Failure to Pay the Deposit of $2500.00

As noted above, the order appointing Special Master Doerr required a deposit of $2500 each by petitioners and respondents (R. 50). This order was entered on September 21, 1955 as a time when petitioner's motion for leave to remove their attorneys was pending and undecided. Thereafter, petitioners continued to be represented on the record only by the attorneys in whom they had lost confidence, and who were publicly disparaging them,[9] until the final judgment of dismissal was entered in January 1956 (R. 154). The efforts of petitioners, acting *pro se*, to secure deferment of the deposit order on the ground that they were without counsel were unsuccessful (51, 53).

In addition to their lack of counsel, petitioners were faced with a bankruptcy proceeding (ultimately dismissed after a jury trial) in which certain alleged funds of the Cooperative had been turned over to a receiver (App. 17a). While this receivership was not instituted until October 12, 1955, some two weeks after the reaffirmation of the deposit order (September 27, 1955, R. 52), when it was instituted it obviously sus-

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der those circumstances, and without counsel, I am going to decline to testify further.

Similarly Gillmor stated (R. 11):

> I, being without [consel] of my own choosing, with this Court's action making it impossible for me to get counsel in whom I have trust and faith—with this Court trying to compel me to give testimony with counsel in whom I have lost confidence, faith and trust, and knowing we have discharged those who presume to represent me, I will stand on my Constitutional rights and ask that I be excused from testifying.

[9] Thus in the final proceedings before the district court on the motion to dismiss the complaint, one of the attorneys of record purporting (despite petitioners' objections) to represent them, informed the court that "I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2500.00 deposit" (R. 14).

pended petitioners' control over the Cooperative.[10] It appears from the report of the receiver in the bankruptcy proceeding (Case No. 1-177) in the district court that the receiver tendered the $2500 deposit to the district judge on October 13, 1955, and that such tender was rejected.

On the basis of the refusals to testify and failure to make the deposit order, respondents moved that the action be dismissed (R. 82-84). No written opposition to this motion was filed by petitioners' attorneys, and petitioners' resistance *pro se* (R. 89) was stricken (R. 103, 106). After giving petitioner Strong a final opportunity to testify, the master ordered dismissal of the action against the Cooperative and him (R. 115) and submitted a report to the court seeking approval thereof (R. 120). A subsequent order and report providing dismissal as to petitioner Gillmor were filed thereafter (R. 128, 131).

Oral argument on the master's reports and the motions to dismiss were held before the district court. In the course of the argument, one of petitioners' attorneys of record made a number of derogatory statements concerning petitioners, such as "I am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis" (R. 13).

The district court found that "plaintiffs' claim that they are unrepresented by any attorney is without

[10] In a colloquy before the master on December 20, 1955 petitioner Strong stated as follows (R. 8-9):

> I say to you, we do not want this case dismissed because of our failure to pay into the Court the $2500. We do not have the $2500. What money as would be available, and I say to you if we had our funds today, I would pay the $2500 into the Clerk of Court, but under protest.
>
> Our funds in the amount of $5,081.81 were improperly ordered turned over to a receiver in an involuntary bankruptcy case in this same Court * * *.

merit" (R. 146), and that the failure of certain petitioners to testify and the failure to make the $2500 deposit were contumacious, willful and without justification (R. 148-150). The court ordered the action dismissed as to all the plaintiffs under the inherent power of the Court (R. 153); as to certain individual plaintiffs, the court also relied on Civil Rules 37 and 41 (*ibid*). This judgment was affirmed by the court below (App.).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below sanctioned an improper general reference of an antitrust action to a special master. The decision is in conflict with the philosophy of the rule laid down by this Court in *La Buy* v. *Howes Leather Co.*, 353 U.S. 249, 1 L. ed. 2d 290, and to the extent the case is distinguishable from *La Buy*, it presents an important question which has not been, but should be, decided by this Court. See also *Los Angeles Brush Mfg. Co.* v. *Jones*, 272 U.S. 701; *McCullough* v. *Cosgrave*, 309 U.S. 634.

In the *La Buy* case, as here, a general reference was made, largely on the ground that the case was a complicated one which would require extensive time for disposition, and because of the congested state of the court calendar. In the *La Buy* case this Court held that the abuse of discretion involved was so serious as to warrant the issuance of an extraordinary writ by the court of appeals to prevent the reference to the master.[11]

[11] While this Court was sharply divided on the propriety of the use of the extraordinary writ (see separate opinion, 1 L. ed. 2d at 299) there appears to have been no dissent from the disapproval of the reference. No extraordinary writ is sought in the present case; the present petition seeks review of a judgment affirming a final dismissal of the action.

The opinion below seeks to distinguish the *La Buy* case on several grounds, none of which would justify a result different from the one there reached. The court implies that the issues in the *La Buy* case were not unduly complicated (App. 23a). An examination of this Court's opinion, however, reveals that the *La Buy* case was at least as burdensome to the trial court as has been the present case.[12] In any event, as is forcefully pointed out in the *La Buy* decision, "most litigation in the antitrust field is complex" (1 L. ed 2d at 299), but this is not a justification for abdication by the trial judge of his judicial responsibilities.

It is suggested by the court of appeals that petitioners waived any objections they may have had to the appointment of the master. This holding cannot be squared with the record which shows repeated objections on behalf of petitioners and repeated rulings by the master that participation before him would be without prejudice to challenges to the validity of the appointment (*supra*, pp. 6-7).[13] Moreover, the record establishes that petitioners also sought review by the court itself of the order appointing the master (*supra*, p. 7). Thus, if it be true that objections to appointment of a master technically should be addressed

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[12] The Court noted (1 L. ed. 2d at 295) that in one of the matters involved in *La Buy* "27 pages of the record are devoted to docket entries, reflecting that petitioner had conducted many hearings on preliminary pleas and motions." Indeed, if anything, in number of parties involved and complexity of pretrial matter, the *La Buy* case appears to have excelled the present one.

[13] The consent to appointment of a master by petitioners to which the court of appeals refers was a consent to the appointment of the prior master with limited powers. Petitioners never consented to the appointment of Master Doerr, nor to the plenary powers purported to be conferred upon him.

to the court itself, as the court below implies, it is clear that this requirement was met.[14]

It is also suggested by the court of appeals that the reference order was limited to pretrial matters. It is respectfully submitted that the language of the order of reference (App. 14a) cannot be so construed.[15] Moreover, the interpretive order of the district court, issued after the conclusion of most of the proceedings before the master (supra, p. 6), clearly did not undo the damage caused by the original order. For between the date of the original reference and the interpretive order, the master had in effect tried the petitioners for misconduct and issued an unqualified order of dismissal with respect to some of them (R. 115).

Even if it were concluded that the district court's original order of reference had been limited to pretrial matters, the order would nevertheless engraft an exception on the *La Buy* rule not warranted by this Court's decision in that case. Nothing in *La Buy* indicates that the Court intended to draw a distinction

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[14] The master ordered petitioners' pleadings in this regard stricken (*supra*, p. 9), but it seems evident that he could not lawfully bar access to the court to seek review of the very order appointing him. To arrogate such power to the master would be to hold in effect that he had authority to pass upon the validity of the reference order. If the pleadings filed by petitioners with the court were defective, it was incumbent upon the court itself so to rule, but in any event it cannot be inferred that petitioners affirmatively *waived* their objections.

[15] "• • • and that this entire cause be referred to him for such proceedings as may be necessary to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court."

between delegation of judicial duties in pretrial proceedings and delegation of judicial duties at the trial proper. While the *La Buy* reference was made when trial was imminent, it was not suggested that the reference in that case would have been valid if made at an earlier stage. It is significant that in discussing ways in which courts could cope with the congested calendar problem, this Court did not intimate that burdensome pretrial proceedings be referred to masters. On the contrary, it suggested "the assignment of *judges* to handle only motions, pleas, and pretrial proceedings" (1 L. ed 2d at 299; emphasis added).

Pretrial proceedings, particularly in antitrust cases, are of increasing importance, and the manner in which they are supervised may determine whether litigation will be brought to an expeditious conclusion or will be interminably delayed until the poorer parties to the litigation are left without the ability to continue the litigation. The necessity for *judicial* supervision is as great in the pretrial stage of a case as at the final trial. In referring to the trial proper this Court said in *La Buy* (1 L. ed. 2d at 299):

> It does not follow that antitrust litigants are not entitled to a trial before the court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work.

This salutary principle is equally applicable to pretrial proceedings, and the decision below unduly seeks to limit the rule of the *La Buy* case to the precise facts upon which that case arose. It is important for the guidance of federal courts generally that this Court

authoritatively decide whether such limitation may be sanctioned. If the decision below stands unreversed, a fertile new field will have been created for reference to masters and undue delegation of judicial duties to them, and a grave injustice will have been done to petitioners.

2. If, as petitioner contends, the reference to the master of the entire case was improper, it seems clear that the deposit order (to secure payment of the master's fees and expenses) and the master's subsequent orders requiring petitioners to submit to depositions must fall with the unlawful reference order. But quite apart from the reference order, there is a further important ground for review by this Court.

The decision of the court below approves a shocking departure by the district court (and the special master appointed by that court) from the acceptable and usual course of judicial procedure calling for exercise of the supervisory power of this Court. The court of appeals has sanctioned a flagrant impairment of the fundamental right of counsel, as well as an abuse of discretion by the district court in dismissing the complaint in this case for conduct which was, at worst, an excusable consequence of erroneous orders of the special master.

By order of the special master petitioners were placed in the impossible position of paying onerous fees ($200,000) or being forced against their will to continue to be represented by attorneys who had become contemptuously indifferent to their clients' interests. The record is studded with statements and actions of the attorneys wholly inconsistent with a normal attorney-client relationship. It is no answer to suggest, as did the court below (App. 30a), that petitioners

relied upon unproved charges against their attorneys. For the attorneys' own conduct speaks for itself. They appear to have abandoned all semblance of professional decorum in their representation of petitioners. Thus, in one early pleading filed by them, it was stated (R. 57):

> We believe plaintiffs are committed to the philosophy that it is cheaper to attempt to discharge lawyers than to pay them money provided for that purpose by third parties interested in the success of the litigation, although such action is in breach of trust, in violation of their agreements and amounts to a fraudulent conversion of trust funds.

In the same pleading it was stated that petitioners were "seeking * * * to use this court and this lawsuit as an instrument for commission of a fraud" (R. 62). In one of the last pleadings filed with the district court, *a pleading in which they expressly purported to represent petitioners* (R. 134), the attorneys asserted that two of the petitioners "now seek a dismissal of the cause by indirection" as a "subterfuge" (R. 136). For other examples, see supra, pp. 7-8.

Although the numerous instances of overt hostility and disloyalty on the part of the attorneys were pressed on the court below both in brief and in oral argument, that court's lengthy opinion is silent concerning them. The court seems to have been of the view that the failure of petitioners to appear at the hearing scheduled by the master for consideration of the motion for leave to remove counsel destroyed any right they may have had to effective representation (App. 30a). We do not believe that the constitutional right of counsel may be so easily and inadvertently waived. Whatever fault

may be ascribed to petitioners for failure to appear at the hearing (at a time when they were seeking extraordinary relief from the court of appeals, *supra*, p. 8), it seems clear that they could not properly be compelled thereafter to accept representation by attorneys who made no effective effort to represent them, and who were overtly hostile.

The right to counsel is fundamental to a fair hearing. The layman is helpless without guidance in any complex legal proceeding. In *Powell* v. *Alabama*, this Court said (287 U. S. 45, 69):

> If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense. [Emphasis added.]

This Court has also recognized that effectiveness of counsel is unduly impaired where counsel are not devoted solely to the interests of their client. See *Glasser* v. *United States*, 315 U. S. 60, 70; *Von Moltke* v. *Gillies*, 332 U. S. 708, 725. It has also noted that mutual confidence is indispensable to the relationship. "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer" *In re Paschal*, 10 Wall. 483, 496.

Whatever right may exist in favor of an attorney to resist discharge by his client until he is paid for past services, it seems abundantly clear that such right

is conditioned upon a loyal and faithful discharge of his duties as an attorney so long as the employment relationship may exist. The conduct of these attorneys obviously failed to meet this standard. Yet the master made it impossible for petitioners to file pleadings with him or the court either to complain further of their attorneys' action or to seek relief from his orders (*supra,* p. 9). Under these circumstances it is both understandable and excusable that these lay petitioners, deprived of the opportunity to be represented by counsel in whom they had confidence, were unwilling to submit themselves further to deposition proceedings in which they would be examined by skilled counsel for respondents. It is understandable and excusable that they were reluctant to make the required deposit without advice of reliable counsel, particularly after the institution of the bankruptcy proceeding against the Cooperative (*supra,* p. 11). But even if it be concluded that petitioners were not entirely free from fault, the harshness of the final dismissal of the action with prejudice constituted a serious abuse of discretion.

CONCLUSION

The courts have a basic duty to protect the rights of parties before them, and to assure that the fundamental rights to a trial before the court and to effective counsel are not abridged. Both rights were abridged in this case. It is important to the administration of justice in the federal courts that the decision below be reviewed and reversed by this Court so that it will not stand as a precedent for wholesale references to mas-

ters, and unwarranted interference with the rights of parties to be represented by counsel of their choice.

Respectfully submitted,

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